From that language, it was revealed that the Third Circuit was unclear as to the willful nature of Petitioner's actions. However, the Court never explicitly found that Petitioner's failure to attend was due to his inability to attend, and, in fact, his inability to attend was never referenced. Further, the Third Circuit did not address Petitioner's bad faith.

The Third Circuit continued:

> Huertas' disability did not, as far as we can discern, prevent him from timely filing for protective orders, nor does he explain how his disability prevented his 9:30 a.m. appearance at his fifth deposition.

[Petitioner's Appendix at 6].

The Third Circuit specifically indicated that Petitioner had provided no justification for his failure to abide by the District Court's Order, although they further indicated that Petitioner's conduct did not appear to be "'strategic or self-serving,' an inference usually required for a finding of willfulness." *Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 874-75 (3d Cir. 1994). [Petitioner's Appendix at 6]. (*But see, Hicks v. Feeney*, 850 F.2d 152 (1988). *cert. denied*, 488 U.S. 1005 (1989) (holding Plaintiff's repeated refusal to attend his deposition, once in violation of Court Order, Third Circuit held Plaintiff's conduct as willful).

The Third Circuit addressed the willful nature of Petitioner's actions, but never specifically held that Petitioner's failure to act was due to inability. Moreover, they did not address, refute or disturb the District Court's analysis of Petitioner's bad faith, which was a separate element for analysis and discussion. That bad faith analysis

included the District Court's discussion of Petitioner's unfounded discovery demands, his flagrant refusal to abide by the Federal Rules of Civil Procedure, even after being warned by the Court, and his irrelevant and disparaging remarks made to Defendants' counsel. After analysis of Petitioner's actions as a whole, the District Court stated, with regard to Petitioner's bad faith, that "Plaintiff's behavior deeply troubles the Court." [Petitioner's Appendix at 6].

After careful analysis of all six *Poulis* factors, including Petitioner's willfulness and bad faith, the Third Circuit stated that:

> . . . [although] Huertas' conduct *was not necessarily willful* does not make the District Court's balance unreasonable. (citation omitted) The District Court did not abuse its discretion in dismissing the complaint. Accordingly, we will affirm. (emphasis added)

[Petitioner's Appendix at 7].

During their review of the District Court's analysis of Petitioner's willfulness, the Third Circuit appeared to express some question as to the willful nature of Petitioner's actions. That vacillation was evidenced through their equivocal language of: "[i]t is not so clear" and "not necessarily willful." But they went no further and only questioned that particular aspect of the District Court's analysis. They did not adhere to a position that Petitioner's inaction was due solely to Petitioner's inability. Further, they never disturbed the District Court's analysis of Petitioner's bad faith, which was a separate and equally important element. Moreover, such "lenity evidenced in the opinion of the Court of Appeals, while certainly a significant factor in considering the imposition

of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

The District Court memorandum supporting its order of dismissal indicates that the District Court was extremely patient in its efforts to allow the Petitioner time to comply with discovery demands. Although the Third Circuit raised some concern as to some of the analysis of the District Court with regard to Petitioner's willfulness, it held that the District Court did not abuse its discretion. "Ultimately, the decision to dismiss constitutes an exercise of the district court judges's discretion and must be given great deference by this Court – a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted." *Mindek*, 964 F.2d at 1373. Further, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in doing so." *National Hockey League*, 427 U.S. at 751. In the present matter, the Third Circuit reviewed all six elements under *Poulis*, including an analysis of Petitioner's willfulness and bad faith, and expressly stated that there was no abuse of discretion in affirming the District Court's decision. Petitioner can point to no evidence of abuse of discretion by any court with regard to his claim being dismissed.

Hicks v. Feeney, 850 F.2d 152 (1988), *cert. denied*, 488 U.S. 1005 (1989) further exemplifies the appropriate analysis of the *Poulis* factors and proper dismissal of a complaint pursuant to Rule 37(b) after a Plaintiff fails to appear for a court-ordered deposition. There, as here, the

issue of abuse of discretion of the lower court was analyzed by the Third Circuit. There, as here, Plaintiff "was personally responsible for failing to attend the depositions. *Id.*, at 156. There, as here, the Court of Appeals, affirmed the lower court's determination to dismiss the matter, stating that there was no abuse of discretion. Upon petition for writ of certiorari, this esteemed Court denied certiorari. There is no justifiable reason to again revisit this issue, as the issues are identical. Further, "a remand would tell the district court to ignore [Plaintiff's] willful conduct and simply weigh the relative prejudices to the parties." *Id.*

Finally, although Petitioner attempts to draw analogies between *Societe v. Rogers*, 357 U.S. 197 (1958), and the present case at bar, they are wholly distinguishable. In brief, in *Societe*, the Petitioner was ordered to produce documents. Pursuant to a court order, Petitioner made good-faith efforts and produced 63,000 documents. However, due to potential criminal action for disclosing certain documents, and seizure of other documents by the Swiss government, full compliance was not achieved; therefore, the matter was dismissed pursuant to Rule 37. The Court of Appeals modified this dismissal order and granted a six-month extension to Petitioner to produce the remaining documents. During this period, Petitioner produced over 190,000 documents. Again, however, this was not full disclosure due to the Swiss privacy laws. As a result, Petitioner's claim was dismissed. Upon review by this esteemed Court, it was held that Petitioner's Fifth Amendment due process rights had been violated because their failure to comply was due to "inability, and not to willfulness, bad faith or any fault of the petitioner." *Societe*, 357 U.S. at 1096.

In the present matter, the record is devoid of any inability on behalf of Petitioner in his failure to appear at the first four depositions. The only record of Petitioner's fear of heights is expressed in his motion for a protective order after his fourth failed deposition. Petitioner could have expressed his fear of heights at the outset, but failed to do so. Petitioner could have filed for a protective order at the outset, but failed to do so. Further, after Petitioner's protective order was granted in part and his deposition was scheduled and located on a ground floor, Petitioner once again failed to appear. Petitioner provides no evidence of an inability to appear at the appointed time, although he subsequently claimed that he could not sit for long periods and therefore was justified in failing to appear. However, as the Third Circuit indicated, this claim does not explain why he could not appear at the scheduled deposition time of 9:30 a.m. or why Petitioner never applied for a protective order, although he had done so previously.

The District Court explained in great detail how Petitioner acted wilfully and in bad faith. That order was affirmed by the Third Circuit. Unlike the Petitioner in *Societe*, who made good faith efforts to comply with discovery but was fully unable to do so due to Swiss laws and seizure of documents by the Swiss government, Petitioner Huertas never acted in good faith with regard to complying with discovery requests concerning his deposition or presenting himself for his final court-ordered deposition. Petitioner Huertas baldly failed to appear. Such inaction is due solely to willfulness, bad faith and is the sole fault of Petitioner Huertas.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
NOV 17 2005
OFFICE OF THE CLERK

No. 05-462

IN THE

Supreme Court of the United States

HECTOR L. HUERTAS,

Petitioner,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA,
SUN BANCORP., INC.

Respondents.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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October 6, 2005

QUESTIONS PRESENTED

The district court found pro-se Petitioner, a police-brutality victim wrongfully accused of bank robbery in a civil conspiracy claim, acted with "the 'type of willful or contumacious behavior that can be characterized as acting in flagrant bad faith' " when he did not attend five noticed depositions. The Court of Appeals found "It is not so clear that [Petitioner's] conduct was willful as defined by this Court." The questions presented are:

1. Whether the Due Process Clause of 5th Amendment is violated by the dismissal of an action under the 3rd Circuit's "*Poulis* Balance" for failure to comply with a discovery order, which failure need not show "willfulness"(as the D.R.I. and Federal, D.C. Circuits hold, and cited by the 7th, 8th, 11th Circuits), or

2. Whether a showing of "willfulness or flagrant bad faith" as opposed to *inability* to comply with a discovery order, is a condition for dismissal under Fed.R.Civ.P Rule 37(b) (as the 2nd,4th,5th , 6th Circuits hold). *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958).

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RULES

Fed.R.Civ.P Rule 15(b) and Rule 11(c)(1)(B) ----------2

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COUNTER-CLARIFICATION OF THE RECORD

Clearly, Hicks v. Feeney, 850 F.2d 152 (3rd Cir. 1988), *cert. denied.* 488 U.S. 1005 (1989) is not controlling and does not stand for the proposition asserted. In fact, the Third Circuit held in Hicks,

> In considering the effect of Hicks' conduct, the majority observed that Feeney was "**prevented from preparing a defense** as to the issue of (1) whether his failure to follow constitutionally required procedure caused Hicks' alleged damages; (2) whether Hicks would have remained at DSH even if the procedures had been followed; and (3) Hicks' actual damages (Maj. op. at 155). Each of these factors related to damages and not to liability. Id at 160 note 2.

In the instant appeal the Third Circuit did not find, as in Hicks, that Petitioner Hector L Huertas willfully prevented Respondents from preparing their defenses. In fact, Respondent Sun Bancorp failed to respond to Petitioner Hector L Huertas' principal argument in his opening brief herewith that he fully and in ***good-faith*** complied with interrogatory and production of documents requests; thus, Sun Bancorp conceded this point (Pet. At 8, 16).[1] Similarly, Sun Bancorp also conceded that it did not proffer sufficient evidence showing its branch was, in fact, robbed, and that it admitted violating Petitioner's Fourth Amendment

[1] The designation "Pet." Refers to pages in the Petition for Writ of Certiorari filed by Petitioner on October 6, 2005.

rights, and that the District Court refused to acknowledge Fed.R.Civ.P Rule 15(b) and Rule 11(c)(1)(B) (Pet. At p.16-17).

In Hicks, the defendant filed with the district court a motion to compel Hick's deposition immediately after his first refusal to appear and yet Hicks continued to refuse and did not file any motion for protective order. In the instant appeal, Respondents waited 22 months after the lawsuit was filed and 4 deposition notices to file their first motion to compel their deposition of Petitioner Hector L Huertas; thus multiplying their own expenses and providing the District Court the wherewithal to dismiss Appellant's lawsuit with prejudice. Here, the Petitioner responded to such first motion to compel his deposition with a motion for a protective order that was granted in part, something Hicks categorically refused to do.

In Hicks, "the court warned that additional sanctions, including an outright dismissal, would be imposed if Hicks failed to appear." Id at 155. No such warning or instructions were provided to the Petitioner in the District Court's Order in the instant appeal (C.A. CJ S.a. 52-55). [2]

Additionally, in Hicks the Third Circuit Court stated that "Bernstein[Hick's attorney] informed Hicks of the possibility of the imposition of sanctions for failing to appear at the deposition. Hicks replied that 'he valued his privacy concerning these matters more

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[2] The designation "C.A. CJ S.a." refers to pages in the Joint Supplemental Appendix filed by the City of Philadelphia in the Third Circuit on May 16, 2005.

than any compensatory damages that the court might award' and that he would not appear at any future depositions." Id at 154. In the instant Appeal, no evidence has been proffered that Petitioner Hector L Huertas made any similar statements or that Petitioner categorically refused to be deposed. All City of Philadelphia Assistant Solicitor Michele Dean had to do was schedule the first four depositions within the first or second floor of the City Solicitor's building pursuant to the District Court's subsequent order (En Banc 11-12, C.A. Brief 6, C.A. Reply 23, and D.C. Docket 110 At 2).[3] Petitioner subsequently also respectfully requested that the deposition be held in the afternoon to accommodate the police brutality injury to his spinal cord (C.A. Brief 4).

In Hicks, the Third Circuit also held that "considering appellant's willful refusal to afford appellee discovery relevant, at the least, to the **undecided issue** of appropriate relief, the district court did not abuse its discretion. We will therefore affirm." Id at 153. The District Court and the Third Circuit have not identified any issue as to why the proposed deposition is relevant even though the Third Circuit found "that Huertas' complaint asserts arguably

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[3] The designation "En Banc" Refers to pages in the Petition for Rehearing and Rehearing En Banc filed by Petitioner in the Thiurd Circuit Court on July 31, 2005. The designation "C.A. Brief" refers to pages in the Principal Brief filed by Petitioner in the Third Circuit Court on April 22, 2005. The designation "C.A. Reply" refers to pages in the Reply Brief filed by Petitioner in the Third Circuit Court on June 9, 2005.

meritorious claims." (Pet. App. 7).[4] Respondent Sun Bancorp only alleged to the Third Circuit that it had no factual record, all because the Petitioner showed up for the deposition at 1:00 pm in lieu of 9:30 am (C.A Sun Brief 9, 10-11, Pet. App. 5, C.A. Brief 5).[5] But Sun Bancorp had already admitted that a subsequent lawsuit, filed by the Petitioner concerning only the civil conspiracy claim, arose "out of the same facts and circumstances contained in the present underlying matter which is before this Honorable [Third Circuit] Court." (C.A Sun Brief 1, C.A. Reply 22-23). Then how could Sun Bancorp also say it has no factual record?

Petitioner did not show bad faith as characterized by Respondents. The District Court did not afford Petitioner due process rights by ignoring Fed.R.Civ.P Rule 11(c)(1(B) and not directing the Petitioner to show-cause why he was not in violation. The Petitioner would have proved to the District Court that Respondent Sun Bancorp's former counsel of record Robert Cerino disparaged the Petitioner first by characterizing his complaint as "absurd". Subsequent counsel of record Steven Eichler further disparaged the Petitioner by utilizing the word "venomous" within one of his moving papers filed with the District Court. The Petitioner considered such remark as implying the

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[4] The designation "Pet. App." Refers to pages in the Appendix attached to the Petition For A Writ Of Certiorari.

[5] The designation "C.A. Sun Brief" refers to pages in the Principal Brief filed by Sun Bancorp in the Third Circuit Court.

Petitioner is a snake. City of Philadelphia Assistant City Solicitor Michele Dean also made a remark to the District Court that Petitioner wanted to "open the flood gates." The Petitioner was extremely traumatized by his police-brutality injury to his spinal cord, considered such remarks as "adding insult to injury," and responded with his own disparaging remarks like kind.

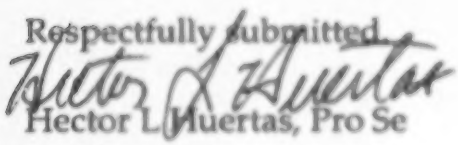
The Petitioner's motions within the District Court were not all frivolous. Respondent Sun Bancorp and City of Philadelphia persistently refused to respond to Petitioner's discovery requests until after he filed motions with the District Court. Case in point, Sun Bancorp refused to answer Petitioner's first set of interrogatories until after Petitioner had filed a motion to compel with the District Court and 588 days after they were first propounded to Sun Bancorp (C.A. Brief 6, D.C. Dockets 95 And 97). The District Court categorically refused to impose any sanctions upon Sun Bancorp even though Sun Bancorp's interrogatory answers did not include a proper certification. The District Court merely ordered Sun Bancorp to produce such certification after the fact.

Finally, Pursuant to Sup. Ct. R. 29.3 "If the document has been prepared as required by Rule 33.1, three copies shall be served -on each other party separately represented in the proceeding." The Petitioner received only one copy of Respondent Sun Bancorp's Brief in Opposition on Monday November 14, 2005.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

A. Third Circuit Denial Of Rehearing *En Banc* (Sep, 7, 2005). . . . . Pet.App. 1
B. Opinion Of U.S. Court of Appeals for the Third Circuit . . . . . Pet.App. 3
C. Opinion of U.S. District Court for the Eastern District of Pennsylvania (Jan. 31, 2005). . . . . Pet.App. 8